Supreme Court, U.S.
FILED

021468 MAR 2 7 2003

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NO.

In The SUPREME COURT of the UNITED STATES

ROBERTO GONZALEZ and GLORIA HOLLAND
Petitioners

v.

NICHOLAS KOKOT and DEVERICK DIXON
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred by not applying the Third Circuit's two prong test to determine whether, under *Town of Rumery v. Newton*, releases of civil rights claims were void as against public policy, to wit: whether the civil rights claims objectively appeared to be frivolous or marginal and whether the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal?

2. Whether, under *Town of Rumery v. Newton*, the defendants' burden to prove that releases of civil rights claims are enforceable is by clear and convincing evidence, or is only by a preponderance of the evidence?

STATEMENT PURSUANT TO RULE 29.6

The plaintiffs-petitioners are Roberto Gonzalez and Gloria Holland. The defendants-respondents are Nicholas Kokot and Deverick Dixon, now known as Yanci Mumba. There are no corporate parties.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on December 27, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution states, in relevant part, that:

> Section 1....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Stated, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983 states, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress....

Indiana Code Section 35-44-3-3(a)(1), "Resisting law enforcement," states that:

> (a) A person who knowingly or intentionally (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer.

Indiana Code Section 35-45-1-3(2), "Disorderly conduct," states that:

> A person who recklessly, knowingly or intentionally...(2) makes unreasonable noise and continues to do so after being asked to stop.

STATEMENT OF THE CASE

The defendants, Nicholas Kokot and Deverick Dixon, were police officers who arrested the plaintiffs, Roberto Gonzalez and Gloria Holland for disorderly conduct and for forcibly resisting, obstructing or interfering with a law enforcement officer under Indiana Code (IC) Sections 35-45-1-3-(2) and 35-44-3-3(a)(1), respectively. Gonzalez and Holland signed a release of all claims against the defendants and the criminal charges were then dismissed. Thereafter, the plaintiffs filed a law suit against Kokot and Dixon under 42 U.S.C. Section 1983 for arresting them without probable cause, and for the use of excessive force against Gonzalez, in violation of their Fourth and Fourteenth Amendment rights.

The district court had jurisdiction pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983.

The district court granted summary judgment to the defendants based upon the release.

The plaintiffs filed a timely notice of appeal and invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. Section 1291, as the district court had disposed of all claims.

The plaintiffs asked the district court and the Seventh Circuit to use the Third Circuit's test to determine whether, under *Town of Rumery v. Newton*, releases of civil rights claims are void as against public policy, to wit: whether the civil rights claims appeared to be frivolous or marginal when viewed objectively and whether the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal. However, neither the district court, nor the Seventh Circuit applied the Third's Circuit's test.

The plaintiffs also asked the district court and the Seventh Circuit to adopt a standard requiring that

defendants, in these circumstances, prove the validity of a release by clear and convincing evidence. The district court presumably did not use that standard, as it was silent concerning the burden of proof, and the Seventh Circuit rejected the plaintiff's position and held that only a preponderance of the evidence was required to prove the validity of the release.

In order to demonstrate that the plaintiffs' civil rights claims were far more than frivolous or marginal, and were in fact, strong, the plaintiffs relied on the depositions of Kokot and of Dixon that were taken in the criminal proceedings against the plaintiffs. According to the defendants' deposition testimony in the criminal case, the facts leading to their arrests of the plaintiffs were as follows. Kokot and Dixon were East Chicago, Indiana, police officers who went to a single family residence and moved wood from the street on to the parkway in front of the home. Gonzalez then opened the door of the home and complained about the wood being put on the lawn. Kokot responded that Gonzalez needed to talk to city officials if he wanted the wood moved. From the doorway, Gonzalez continued to complain about the wood and supposedly started to use swear words while speaking loudly enough to be heard by the neighbors.

Kokot then approached Gonzalez, who was still in the doorway, and asked him to repeat his previous statement. Gonzalez supposedly shouted at Kokot, using an obscenity. According to Kokot, he told Gonzalez to lower his voice and redirect his anger or he would be arrested. However, according to Dixon, Kokot did not warn Gonzalez to lower his voice, and only told Gonzalez to stop "talking language like this" or be arrested.

Gonzalez allegedly began to yell belittling comments at Kokot and turned his back and placed

his hands behind his back as if he was being arrested. Kokot then attempted to handcuff Gonzalez. Having listened to everything, Dixon admittedly did not know why his partner was arresting Gonzalez.

Gonzalez was said to have resisted, while Kokot was trying to cuff him, by restraining his left arm and trying to pull away from Kokot and then leaning back into Kokot. Kokot put Gonzalez on the ground, and Gonzalez tried to stand up. Kokot stopped Gonzalez from standing up and finished cuffing him.

While Kokot was trying to cuff Gonzalez, Holland came out of the house and tried to position herself between them. According to Dixon, Holland grabbed Gonzalez's uncuffed arm and said, "don't take him, please." Dixon told her to get out of the way, Holland said, "no I ain't going nowhere," and Dixon grabbed her arm, led her off the steps, and arrested her.

Twice, Holland allegedly pulled one of her arms away from Dixon while he was cuffing her, so he put her on the ground and finished cuffing her. Holland was admittedly never violent.

There was no evidence that any neighbor complained about, or particularly reacted to, Gonzalez's speech.

The disorderly conduct charge against Holland was based on her allegedly cursing. But, in their depositions in the criminal case, neither defendant testified that Holland ever cursed. Nor did their depositions describe Holland as yelling or making a loud noise.

While the criminal charges were pending against the plaintiffs, their attorney served a Notice of Tort Claim on the City of East Chicago alleging that they were arrested without probable cause, and that they were subjected to excessive force, in violation of their constitutional rights. The prosecutor was

informed of the tort claim.

Releases of all tort claims, including civil rights claims against Kokot and Dixon, were drafted by a city attorney. The prosecutor participated in obtaining signed releases out of a concern to protect Kokot and Dixon. He knew that it was important to them to be released from liability. The prosecutor admitted that "the real issue" was the tort claim because he wanted Kokot and Dixon to approve what he was going to do, and they wanted releases if the charges were going to be dismissed. The prosecutor admitted that had there been no tort claim, "a straight dismissal" would "probably" have been "a realistic, potential, appropriate disposition of the charges" in a case like the one against Gonzalez and Holland. The prosecutor also acknowledged that in cases with a potential tort claim, absent a release, he would want a guilty plea, not just a dismissal, in order to help the police officers defend against any potential tort claim.

Gonzalez and Holland signed the release and the criminal charges against them were dismissed by the prosecutor.

There is no evidence that the criminal court judge was told anything about the civil releases of tort liability.

REASONS FOR ALLOWING THE WRIT

I. Certiorari Should Be Granted Because Courts Of Appeal Are In Conflict As To The Means For Determining When Releases Of Civil Rights Claims Are Void As Against Public Policy.

Releases given in return for criminal dismissals are unenforceable if they violate public policy, given the particular facts of the case. *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d

405 (1987).

The Third and Seventh Circuits are in conflict as to the proper analytical framework which should be utilized to effectuate that rule of law. As a result, *Rumery* is applied inconsistently and the outcome of a case can be a matter of where the case happens to be heard.

In the Third Circuit, a two-prong test is used to determine whether evidence of police misconduct invalidates releases of civil rights claims. *Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 527-29 (3d Cir. 1996); *Kinney v. City of Cleveland*, 144 F.Supp. 2d 908, 918-19 (N.D. Ohio 2001). Under the Third Circuit's test, the defense normally must establish: (1) that there was an objective showing that the released civil rights claims appeared to be marginal or frivolous when the agreement was made; and (2) that the prosecutor was subjectively motivated by the civil rights claims appearing to be marginal or frivolous. *Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 527-29 (3d Cir. 1996); *Kinney v. City of Cleveland*, 144 F.Supp. 2d 908, 918-19 (N.D. Ohio 2001).[1]

A. The Seventh Circuit's Decision Conflicts With The Objective Prong Of The Third Circuit's Test.

In contrast, the Seventh Circuit applied, in part, a test of whether "there was enough evidence to

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1. Under the Third Circuit's analysis, the objective requirement might be relaxed in cases where there is an unusually compelling public interest reason to enforce the release. *Cain*, 7 F3d. At 383; *Livingstone*, 91 F.3d at 529, n.16 (3d Cir. 1996).

send the criminal case to trial." *Gonzalez*, 314 F.3d at 320. The Seventh Circuit also referred to the criminal charges as "colorable." *Gonzalez*, 314 F.3d at 320. That is significantly different than whether the civil rights claims appeared to be frivolous or marginal when viewed objectively.

Furthermore, the Seventh Circuit's test, unlike that advanced by the plaintiffs and used by the Third Circuit, is entirely inapplicable to the claim of excessive force. Unlike probable cause, excessive force is not related to whether the criminal charges were colorable or triable.

Not only is it important for the analytical disparity between the circuits to be resolved, it is important that courts of appeal have a structured, specific analytical framework. The two-prong test provided by the Third Circuit meets that need.

The Seventh Circuit's failure to apply the objective prong of the Third Circuit's test determined the outcome of the instant case and will determine the outcome of cases in the future. The depositions given by Kokot and Dixon, in the criminal case, objectively show that the plaintiffs' civil rights claims are not marginal or frivolous. As to Gonzalez, according to Dixon, an essential element for probable cause to arrest for disorderly conduct, a warning to quiet down, was never given.[2] Additionally, probable cause to arrest Gonzalez for disorderly conduct was lacking because his speech was political, regardless of whether he was loud or obscene, since he was

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2. The essential elements of disorderly conduct under IC Section 35-45-1-3(2) are (1) acting recklessly, knowingly or intentionally; (2) that the noise was unreasonable; and (3) that the noise was unreasonable both before, and after, an official warning to lower the noise. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996).

complaining about the city putting the wood on his grass and the city's failure to remove the wood after being asked to do so.[3] As to Holland, the officers' accounts lacked any of the elements of the disorderly conduct charge. As to the forcibly resisting charges, the officers' accounts merely described passive, non-forcible resistance, so that the essential element of acting forcibly was absent.[4] Without the essential elements of the offense, there could not be probable cause to arrest. Furthermore, there was an utter lack of evidence upon which to conclude objectively that Gonzalez's claim of excessive force was marginal or frivolous.

That the differences between the Third Circuit

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3. Under Indiana law, noisy political expression, regardless of whether it is loud or obscene is rebuttably presumed not to be disorderly conduct, and that presumption can only be overcome by demonstrating that the impairment of the speech was slight or that the speech threatened a particular harm analogous to a tortious injury on an identifiable private interest. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 957, 960-61 and 964 (Ind. 1993). Indiana defines political speech as speech which refers to government action, regardless of whether the speech is obscene or profane or otherwise inappropriate. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 957, 960-61 and 964 (Ind. 1993).

4. An essential element of forcibly resisting, obstructing or interfering with a law enforcement officer, under IC Section 35-44-3-3(a)(1) is that the conduct is forcible. *Spangler v. State*, 607 N.E.2d 720, 723-724 (Ind. 1993). Under Indiana law, forcible means "when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties" and neither passive resistance, nor non-forcible, albeit "active" resistence, meets the statutory threshold. *Spangler*, 607 N.E.2d at 723-724; *Ajabu v. State*, 704 N.E.2d 494, 495 (Ind. Ct. App. 1998).

and the Seventh Circuit lead to different outcomes underscores the importance of having this Court resolve which test should be used to determine whether releases of civil rights claims are void as against public policy.

B. The Sixth Circuit May Be In Conflict With Both The Seventh Circuit And The Third Circuit.

In addition to the clear conflict between the Third and the Seventh Circuit, they both may be in conflict with the Sixth Circuit. In *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993), the Sixth Circuit indicated that substantial evidence of police misconduct means that a prosecutor should not obtain a civil rights release and that such a release should not be enforced. *Id.*, 5 F.3d at 974. While that is true, if substantial evidence of police misconduct is the threshold which must be reached, that conflicts with the Third Circuit's test of the civil rights claim not appearing to be marginal or frivolous. But, a test of substantial evidence of police misconduct is also different than the Seventh Circuit's criteria of criminal charges being triable or colorable. There can be both police misconduct and triable criminal charges. This further illustrates the disparate nature of the ways in which *Rumery* is being interpreted and implemented.

C. The Seventh Circuit's Decision Conflicts With The Subjective Prong Of The Third Circuit's Test.

While the Seventh Circuit did appear to consider the prosecutor's motives, it did not follow the standard promulgated by the Third Circuit and urged by the plaintiffs. The Seventh Circuit correctly indicated that the prosecutor could consider the

merits of potential civil rights claims. *Gonzalez*, 314 F.3d at 320. But, that vague statement falls far short, and is substantially different than the second prong of the Third Circuit's test which requires that the defense prove the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal.

This difference in analysis is also outcome determinative. To effectuate the subjective prong of the Third Circuit's test, releases should not be obtained from criminal defendants if the prosecutor acts "out of concern for the private interests of government officials" or is motivated "by a desire to protect the relevant police officers." *Cain*, 7 F.3d at 381 and *Livingstone*, 91 F.3d at 533. In the case at bar, the prosecutor admittedly acted to protect the interests of Kokot and of Dixon and obtained releases, even though he conceded that, without the tort claims, a "straight dismissal" would "probably" have been "a realistic, potential, appropriate disposition of the charges." As a result, the criminal justice process became subordinated to the private interests of the arresting officers. Protecting the public interest against such subordination requires that the releases not be enforced under the Third Circuit's test, but not under the Seventh Circuit's method.

II. This Court Should Resolve Whether The Burden Of Proof To Establish That Releases Of Civil Rights Claims Are Valid Is By Clear And Convincing Evidence Or Is Merely By A Preponderance Of The Evidence.

Under *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), the burden of proof is on the defendant to demonstrate

that a release of a civil rights claim is enforceable, both because it was voluntary and because its enforcement is consistent with the public interest. In the Third Circuit, clear and convincing evidence is required, at least to prove the voluntariness of an oral release. *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-36 (3d Cir. 1996). *Livingstone* did not decide whether the same standard applied to written releases. *Id.* at 536, n.34. However, a significant portion of the *Livingstone* court's rationale is equally applicable to a written release of a civil rights claim. A higher standard of proof is appropriate where "particularly important individual interests or rights are at stake." *Livingstone*, at 535. Successful civil rights cases " do more than compensate injured plaintiffs, they serve the important public purpose of exposing and deterring official misconduct, and thereby protecting the right of the public at large. In *Rumery*, all nine Justices recognized the importance of ensuring that release-dismissal agreements do not encroach upon this purpose." *Livingstone*, at 535. *See Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). Furthermore, those public concerns are likely to be frequently disregarded in trading dismissals of criminal charges for civil releases. This is because the incentive to avoid a criminal prosecution, even for an innocent person, can readily outweigh the potential benefit of maintaining a right to prosecute a civil rights case. This is particularly true where the compensatory damages may be relatively small.

These reasons for the standard of proof being clear and convincing are equally applicable to the defendants' burden to prove that enforcement of the release is consistent with public policy. *See Rumery*, 480 U.S. at 392 and 401, 107 S.Ct. at 1191 and 1196.

In the present ca , the Seventh Circuit, although it was dealing with a written release, recognized a conflict between the Third and Sixth Circuits on the standard required to prove the validity of the release, and agreed with the Sixth Circuit that the burden is satisfied by a preponderance of the evidence. *Gonzalez*, 314 F3d. at 318-19. *See Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir. 1999).

The standard of proof, both as to voluntariness, as well as to the public interest, is an important issue. The outcome of cases can be determined by whether the standard is a preponderance or clear and convincing evidence. That issue needs to be resolved by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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